

November 12, 2009

Mr. Russell F. Bohlin
165 Belmar Boulevard
Farmingdale, NJ 07727

Mark M. Roselli, Esq.
ROSELLI GRIEGEL LOZIER & LAZZARO, PC
1337 State Highway 33
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Re: Russell F. Bohlin v. Brickyard, LLC
OAL Dkt. No. ADC 00743-2008S

Gentlemen:

At its regular meeting held on Thursday, November 5, 2009, the State Agriculture Development Committee (SADC) approved a Final Decision affirming the Initial Decision issued by ALJ Martone on September 29, 2009. A copy of the Final Decision is enclosed.

The agency's affirmance was dated and signed by SADC Chairman Douglas H. Fisher on November 5, 2009. Please note that the Committee's action is not technically official until the November 5 meeting minutes are approved at the next SADC meeting (December 10, 2009) and the gubernatorial veto period has expired 15 business days after the Governor receives the approved minutes. N.J.S.A. 4:1C-4f. SADC staff obtained approval of the Final Decision by the Committee and Secretary Fisher's signature

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within 45 days of the Initial Decision, thus obviating the need for an extension of time to issue the Final Decision and a lengthier delay in resolving the case.

If you have any questions or need anything further please contact me at your convenience.

Thank you.

Respectfully,

BRIAN D. SMITH, ESQ.
Chief of Legal Affairs, SADC

cc: Susan E. Craft, Executive Director, SADC (cvr. ltr.)
Marilyn J. Mandl, Sr. Mgmt. Asst., OAL (w/cc Fin. Dec.)
Harriet Honigfeld, Admin., MCADB (w/cc Fin. Dec.)

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RUSSELL F. BOHLIN,

Petitioner,

vs.

BRICKYARD, LLC,

Respondent.

STATE OF NEW JERSEY

OAL DKT. NO.: ADC 743-08

AGENCY REF. NO.: SADC #649

FINAL DECISION

Brickyard, LLC (hereafter "Brickyard") owns approximately 161 acres in Howell Township, Monmouth County (Block 224, Lots 17, 17.01, 17.02, and 28-32; hereinafter "the property"). Brickyard purchased the majority of the property in 2003 and an additional lot in 2005. Eighty of the 161 acres are deemed appurtenant woodlands. The property was used as a horse farm prior to Brickyard's purchase.

After Brickyard's purchase, the company leased portions of the property to tenants that boarded horses and utilized the land for pasturing. Additional agricultural activities included renting land to a farmer who kept 40 goats, 200 chickens, 10 beef cattle and four calves during 2003-2004. These animals were removed in 2004 or 2005. Brickyard also cut and processed trees grown on the property.

In June 2005 Brickyard applied to the Township of Howell (Township) for residential subdivision approval, and in June 2006 the Township granted final approval for 18 homes.

In November 2005 Russell F. Bohlin (Bohlin), an adjacent landowner, submitted a right-to-farm complaint to the Monmouth County Agriculture Development Board (MCADB or Board) on behalf of himself, his wife, and 62 local residents. The complaint alleged that the clearing of old-growth trees, and the importation and grading of soil on the property, was not undertaken by Brickyard for agricultural purposes but were conducted in furtherance of residential development.

The Township joined the Bohlin complaint in December 2005 and also informed the Board that it had issued a Stop Work Order against Brickyard regarding any further clearing or improvement of the land.

PROCEDURAL BACKGROUND

In or about November 2005 the MCADB forwarded the Bohlin complaint to the SADC pursuant to the Right to Farm Act, N.J.S.A. 4:1C-10.1c (the Act), as the activities that were the subject of the complaint were not addressed in any promulgated agricultural management practices. The SADC conducted hearings from April through December 2006, and issued findings on June 25, 2007 that were forwarded to the MCADB. The SADC concluded that Brickyard was a commercial farm eligible for right-to-farm (RTF) protection and that most of its activities were conducted for agricultural purposes protected by the Act. The agency also determined that certain tree-cutting, soil movement and land grading by Brickyard were not generally accepted agricultural

management practices because they were not undertaken pursuant to forestry management and farm conservation plans.

The Board held a hearing and decided the case on October 3, 2007, then issued a resolution of memorialization on November 7, 2007 partially affirming the SADC's findings. The MCADB disagreed with the agency's conclusion that Brickyard had not engaged in generally accepted agricultural management practices with respect to the tree clearing, soil movement and land grading. By letter dated November 9, 2007 the MCADB's administrator transmitted a copy of the resolution to all interested parties with a cover letter stating "[p]er state statute, a concerned party has 45 days from the date the resolution was memorialized to file an appeal with the [SADC]."

On December 19, 2007, or 42 days after the date of the Board's resolution, Bohlin filed a notice of appeal of the MCADB decision with the SADC, contending that Brickyard was not a "commercial farm" entitled to right-to-farm eligibility and that Brickyard had engaged in nonagricultural activities that were not RTF-protected. Attached to the notice of appeal was a copy of the MCADB administrator's November 9, 2007 transmittal letter.

The SADC, pursuant to N.J.S.A. 4:1C-10.2, forwarded the Bohlin appeal to the Office of Administrative Law (OAL) by letter dated January 22, 2008. The OAL is a part of the executive branch of state government that performs the judicial function of hearing disputes arising from the

actions of state agencies and issuing initial decisions that can be affirmed, modified or rejected by the agency head. By order dated June 30, 2008, Administrative Law Judge (ALJ) Joseph F. Martone dismissed the Township and the MCADB from the case pursuant to their motions, thus leaving Brickyard and Bohlin as the remaining parties. The OAL hearing was originally scheduled in June 2009 but was adjourned; the case was rescheduled for September 17, 2009, and Brickyard's attorney filed a motion returnable that day to dismiss Bohlin's December 19, 2007 appeal because it was filed late.

The Initial Decision by ALJ Martone granted Brickyard's motion to dismiss on the ground that the Bohlin appeal of the MCADB's November 7, 2007 decision should have been filed with the SADC within 10 days of the Board's memorializing resolution based on the clear language of N.J.S.A. 4:1C-10.1d.¹ The judge additionally referred to various state appellate and Supreme Court cases for authority that statutory time periods governing appeals to executive branch departments may be enlarged only by the Legislature and not by courts or state agencies. Typical of the holdings in those cases was that set forth in Scrudato v. Mascot Sav. & Loan Ass'n., 50 N.J.Super. 264, 269 (App. Div. 1958):

Where a statute sets up precise time limits within which an aggrieved party may seek recourse to

¹ The ALJ also cited N.J.A.C. 2:76-2.10(b)2ii. as support for the 10-day appeal period, but that regulation applies in cases where a Board issues a decision in a dispute concerning activities that are addressed by an agricultural management practice (AMP). The complaint against Brickyard implicated activities *not* addressed by an AMP, which is why the MCADB initially referred the matter to the SADC in accordance with N.J.S.A. 4:1C-10.1c.

administrative adjudication, those limits have been held mandatory and not subject to relaxation. The agency is without power to waive them and proceed to hearing and determination notwithstanding noncompliance.

Judge Martone was mindful that Bohlin had been provided with an incorrect written instruction from the MCADB administrator that the appeal period was 45 days; nevertheless, the ALJ determined that "neither the Board representative nor any other individual, no matter what their position, has the authority to extend the time for appeal as mandated by the Legislature."

No exceptions to the Initial Decision were filed with the SADC by Bohlin.

LEGAL DISCUSSION

ALJ Martone concluded that since Bohlin's appeal of the MCADB decision was not filed with the SADC within 10 days, neither the agency nor the OAL had jurisdiction to hear the matter, and the case was dismissed.

The provisions of N.J.S.A. 4:1C-10.1 govern the general process by which RTF disputes, e.g., farmer-neighbor conflicts, are handled at the county and state level.² This statute was enacted along with other provisions in the 1998 amendments to the Act.

N.J.S.A. 4:1C-10.1c applied to Bohlin's right-to-farm complaint against Brickyard. The complaint alleged that the

² A right-to-farm dispute, or "conflict resolution" case, is to be distinguished from a site specific agricultural management practice determination issued by a county agriculture development board (CADB). The latter involves an application filed with the CADB by an eligible commercial farm for a determination that certain activities conducted on the farm are specifically permitted by the Act and/or are in compliance with agricultural management practices established in SADC rules. N.J.S.A. 4:1C-9.

clearing of old-growth trees and the importation and grading of soil, activities not addressed by an AMP, were being undertaken on the Brickyard property. Accordingly, Monmouth County forwarded the complaint to the SADC

for [the SADC's] determination of whether the disputed agricultural operation constitutes a generally accepted agricultural operation or practice. Upon receipt of the complaint, the [SADC] shall hold a public hearing and issue its decision, in writing, to the county board. The county board shall hold a public hearing and issue its findings and recommendations within 60 days of the receipt of the committee's decision [N.J.S.A. 4:1C-10.1c.].

The CADB's findings and recommendations may be appealed, but only in accordance with N.J.S.A. 4:1C-10.1d, which states that "[a]ny person aggrieved by the decision of the county board shall appeal the decision to the [SADC] within 10 days." If the appeal is timely filed, then the SADC refers the matter to the OAL pursuant to N.J.S.A. 4:1C-10.2, initiating the process by which a final decision is eventually issued by the agency with a right of appeal to the Superior Court, Appellate Division. N.J.S.A. 4:1C-10.1e.³

The ALJ, in dismissing the Bohlin appeal, relied on the general rule that statutory time periods governing appeals to executive branch departments cannot be enlarged by courts or state agencies. The SADC notes that limitation periods may be tolled in particular circumstances if the legislative

³ The SADC recognizes that the MCADB's transmittal of the Bohlin complaint to the SADC, the agency's April-December 2006 hearings, and the referral of the SADC hearing report to the Board were in accordance with N.J.S.A. 4:1C-10.1c involving right-to-farm disputes concerning activities not addressed by an AMP, but that the procedural regulations at N.J.A.C. 2:76-2.10(c) governing non-AMP cases are inconsistent with the statute. The SADC intends to amend that regulation to conform to the statute.

purpose underlying the statutory scheme will thereby be effectuated. White v. Violent Crimes Compensation Board, 76 N.J. 368, 379 (1978).

ALJ Martone was also mindful of the harsh effect the Initial Decision would have on Bohlin, a *pro se* litigant. The SADC also appreciates the impact of the dismissal of Bohlin's appeal; nevertheless, the agency observes that while minor indulgences are customarily accorded *pro se* parties in contested cases, the right of self-representation carries with it the overall responsibility to comply with relevant rules of procedural and substantive law. State v. Crisafi, 128 N.J. 499, 510-12 (1992). N.J.S.A. 4:1C-10.1d, a procedural law of major significance, unambiguously imposes a 10-day period within which to file an appeal of a county board decision. While the MCADB administrator's advice to the contrary was unfortunate, it did not absolve Bohlin from undertaking his own due diligence.

CONCLUSION

For the reasons set forth above, the SADC **AFFIRMS** ALJ Martone's Initial Decision in this matter.

IT IS SO ORDERED.

Dated: November 5, 2009

Douglas H. Fisher, Chairman,
State Agriculture Development
Committee